

1 William D. Hyslop  
2 United States Attorney  
Eastern District of Washington  
3 Thomas J. Hanlon  
4 Assistant United States Attorney  
Richard Burson  
5 Assistant United States Attorney  
6 402 E. Yakima Avenue, Suite 210  
Yakima, Washington 98901  
7 (509) 454-4425

8 IN THE UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF WASHINGTON

10 UNITED STATES OF AMERICA,  
11

12 Plaintiff,

13 vs.

14 JAMES DEAN CLOUD,  
15

16 Defendant.

1:19-CR-02032-SMJ-1

United States Response to  
Defendant's Motion to Suppress  
Victim E.Z.'s Identification

September 29, 2020, at 9:00 a.m.  
With Oral Argument

17 Plaintiff, United States of America, by and through William D. Hyslop, United  
18 States Attorney for the Eastern District of Washington, Thomas J. Hanlon, Assistant  
19 United States Attorney for the Eastern District of Washington, and Richard Burson,  
20 Assistant United States Attorney for the Eastern District of Washington, hereby  
21 submits its response to the Defendant's Motion to Suppress the positive identification  
22 of the Defendant by one of the Defendant's victims, E.Z.  
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## I. INTRODUCTION

The Defendant is seeking to strike the identification of him by yet another witness. This time, he seeks to strike identifying testimony of a witness who had ample opportunity to view the Defendant and gave an accurate description of the Defendant prior to confidently and quickly picking him out of a lineup. His motion rests, as it must to survive, on the premise that there was police misconduct that created an unduly suggestive lineup. That is a rightfully high bar that the Defendant does not reach.

The Defendant's assertions that police engaged in misconduct are in some instances inconsistent with the recording of the lineup and the interview that proceeded it, filed with the Court as Exhibit A to this response. Other assertions are correct, in that the detectives conducting the lineup did not follow agency policy. But he fails to connect the dots between an imperfect procedure and actual suggestion by the Detectives. The law is clear: The Defendant does not have the right to a perfect lineup procedure. Rather, he has the right to a lineup that is not so impermissibly suggestive so as to make the identification of him by the witness a certainty. The lineup he now challenges far exceeded that requirement.

Even if the Defendant had established that detectives engaged in misconduct that led to an unduly suggestive lineup, the Court still must find that E.Z.'s identification was unreliable. However, the record here shows the opposite. There is

1 no doubt that E.Z. is a reliable witness, as detailed below. Her right to identify her  
2 attacker in court and the jury's right to weigh her identification should not be impeded  
3 by the Defendant.

## 4 **II. BACKGROUND**

### 5 **A. E.Z. witnesses several murders and is shot attempting to escape.**

6 On June 8, 2019, just after 4:00 p.m., E.Z. called 911 and reported that she was  
7  
8 in a truck headed west on Evans Road in White Swan. She told dispatch she was  
9  
10 fleeing from her friend's house, where unknown assailants had opened fire on the  
11  
12 vehicle she and her friends were in. Her friend L.L. was driving the truck from the  
13  
14 passenger side of the vehicle, because her other friend, Dennis Overacker, was dead in  
15  
16 the driver's seat, having been shot in the head. E.Z. and L.L. had both been shot, but  
17  
18 survived. E.Z.'s infant child was unharmed.

19 Officers intercepted the truck on Evans Road, about 12 miles from John Cagle's  
20  
21 house, and performed CPR on Overacker, which was unavailing. L.L. and E.Z. exited  
22  
23 the vehicle and L.L. was screaming that he had been shot in the head. Officers  
24  
25 administered aid while L.L. told them that he was at Cagle's to purchase motorcycle  
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27 parts, but encountered three males, one of whom told him that Cagle was not seeing  
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29 anyone. L.L. said that after being told that, one of the males pointed a rifle at  
30  
31 Overacker just before the shooting started. L.L. described one of the males as having  
32  
33 puffy dark curly hair and wearing a red shirt, and a second male with a blue shirt. He

1 could not provide details for the third male he had seen at Cagle's. E.Z. told an officer  
2 that she had been sitting in the rear seat of the truck when someone started shooting at  
3 them. She had shielded her child and was hit by several shotgun pellets in the process.  
4  
5 Emergency services began administering aid to E.Z. on the scene. E.Z. was taken to  
6 the hospital. According to the author of a medical notation, who heard it from  
7 paramedics, while en route, E.Z. said that she was going to friend's house and was  
8 shot by an oncoming driver (this is likely the result of a game of telephone).  
9

10 E.Z. and L.L. directed law enforcement to the residence in White Swan where  
11 they had been shot – 5151 Medicine Valley Road, the home of John Cagle, a man  
12 affectionately known as “Dobbie Jack.” Officers arriving at Dobie Jack's home  
13 encountered a grisly scene. Thomas Hernandez laid face down in the drive way,  
14 unconscious and suffering from a gunshot to the head that would later kill him. Just  
15 inside the front gate of the property, Catherine Eneas laid dead from a gunshot wound.  
16  
17 Around back, near a game room, Michelle Starnes was found dead, also from an  
18 apparent gunshot wound. Finally, inside the game room, Cagle was found dead from a  
19 gunshot to the head. Discharged shell casings were littered about the bodies.  
20  
21

22 B. E.Z. is interviewed at the hospital.

23 While tribal police secured the scene in White Swan, E.Z. was at a hospital in  
24 Yakima being interviewed by law enforcement. Among other things, E.Z. told the  
25 interviewing officer the following:  
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1 E.Z. arrived to Cagle's house earlier that day along with Overacker, Hernandez,  
2 L.L. and E.Z.'s child. They arrived in Overacker's truck. Overacker was driving, L.L.  
3 was in the front passenger seat, Hernandez was seated in the back seat behind L.L. and  
4 E.Z. was seated in the driver's side backseat behind Overacker. When they arrived,  
5 E.Z. saw an Indian male wearing a red shirt and holding a gun meet them at the gate.  
6 When Hernandez told the Indian male in the red shirt that the group was there to see  
7 Cagle, the Indian male responded that Cagle "wasn't seeing anyone right now." E.Z.  
8 saw Hernandez exit the truck and approach another Indian male wearing a blue shirt  
9 and carrying a gun. E.Z. stated that Hernandez talked to the Indian males for a short  
10 time. Then she saw the three of them, Hernandez, red-shirt and blue-shirt, walk back  
11 to the truck. She overserved that everything seemed fine at first. Red-shirt asked  
12 Overacker for a cigarette. When Overacker leaned to the console to get a cigarette, he  
13 was suddenly shot in the head. She reported that she thought blue-shirt shot first. As  
14 she recalled at the time, L.L. was shot after Overacker, followed by Hernandez. L.L.  
15 was able to take control of the truck and drive it away. E.Z. heard more shots as they  
16 were driving away.

17 C. E.Z. goes to the Sherriff's Office to give a statement and picks the Defendant  
18 out of a photo lineup.

19 On June 10, 2019, Yakima County Sherriff's Office Detectives Mike Williams  
20 and Brian McIlrath were on duty at the Sherriff's Office on 1<sup>st</sup> Street in Yakima. E.Z.  
21 arrived on her own accord to speak to officers about what had happened on June 8<sup>th</sup>.

1 By this time, practically the entire Sherriff's Office was or had been involved in the  
2 investigation of the Medicine Valley murders, including 100% of YSCO detectives.  
3 There was no one available to conduct an interview or photo lineup who was not  
4 already familiar with the investigation.  
5

6 Detectives Williams and McIlrath took E.Z. to an interview room equipped with  
7 audio and video recording equipment, which set this interview apart from other  
8 interviews and lineups that had been conducted in the field and thus were without the  
9 benefit of audio and video recording equipment<sup>1</sup>.  
10

11 E.Z. provided the following details in the recorded interview prior to the lineup:  
12 Overacker picked up E.Z. at her residence and took her to L.L.'s. From there, L.L.,  
13 Overacker, and E.Z. drove to Cagle's house in Overacker's truck. E.Z. stated that they  
14 were going over there to check on Cagle, who had been being "taxed" by people in the  
15 area. They pulled up to the front gate, and a young man whom E.Z. described as a  
16 native around 19-23 years old and wearing a red shirt, walked outside the gate and up  
17 to the driver's side window where Overacker was sitting. The man in the red shirt told  
18 Overacker that Cagle "wasn't having any visitors right now." He was not holding  
19 anything in his hands at this time. The man in the red shirt looked to E.Z. like a white  
20 man from a distance, but E.Z. could tell he was native when he approached the  
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26 <sup>1</sup> The recording of the interview, in its entirety, is being submitted as a physical  
27 exhibit with the court.

1 vehicle. E.Z., L.L. and Overacker left Cagle's and drove to Hernandez's residence.  
2 They told Hernandez what had happened at Cagle's, and that it appeared that  
3 something was amiss. Hernandez agreed to go back to Cagle's with them and got in  
4 the truck. They drove back to Cagle's. Hernandez got out of the truck and spoke to the  
5 guy in the red shirt. E.Z. observed, in addition to the man in the red shirt, a girl, a  
6 skinny guy in a blue shirt, and someone in the driver's seat of a red SUV. E.Z. did not  
7 know any of them. The man in the blue shirt had a shotgun. Overacker turned the  
8 truck around so that the truck was pointing away from the residence. The man in the  
9 blue shirt walked into Cagle's house. The man in the blue shirt came out and  
10 Hernandez walked toward the house, came back, and started talking to the guy in the  
11 red shirt again. The man in the red shirt was now holding a gun. The man in the red  
12 shirt and Hernandez walked back toward the truck. Hernandez asked Overacker, who  
13 was still sitting in the driver's seat of the truck, if he had a cigarette for the guy in the  
14 red.  
15

16 Overacker turned to grab a cigarette and the man in the red shirt shot  
17 Overacker, then Hernandez twice, and then L.L. E.Z. remembers turning to cover the  
18 baby. E.Z. thinks that Overacker must have pushed the gas when he was shot because  
19 the truck started moving down the driveway. L.L. reached over and took control of the  
20 vehicle. E.Z. thought at the time that Overacker had been shot in the face. E.Z. called  
21 911 while L.L. drove. They managed to escape.  
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1 E.Z. clarified that the guy in the red shirt was the one who Hernandez had asked  
2 Overacker for a cigarette for, and described the man in the red shirt as “maybe  
3 chubby” and “thicker.” She clarified that the man in the red shirt was the one who shot  
4 Overacker. She was in the backseat at the time. E.Z. did not know who shot  
5 Hernandez, but identified the man in the red shirt as the one who shot L.L. When  
6 asked what the other individuals were doing (referring to the two other people at  
7 Cagle’s), E.Z. replied, **“I don’t even know, I think I was just watching the guy in**  
8 **the red.”**

11 Detective McIlrath asked E.Z. if anyone had shown her a photo montage, to  
12 which she shook her head no. Detective McIlrath asked E.Z. if “she got a pretty good  
13 look at these guys,” and E.Z. shook her head to indicate “yes.” Detective McIlrath left  
14 the interview room to compile lineups.  
15

17 At 13:26 (or 29:19 into the recording), Detective Williams and E.Z. began  
18 talking about where L.L. had driven the truck after Overacker was shot and the  
19 interaction with first responders. They talked about E.Z.’s prior visits to Cagle’s house  
20 and her relationship with Cagle and Starnes. The conversation turned to E.Z.’s drug  
21 use, with Detective Williams telling E.Z. that he doesn’t judge her for the drug use,  
22 and that he understands that “once you get on that stuff it’s harder than anything to get  
23 off of.” Detective Williams told E.Z. that the thing he was concerned with, other than  
24 the murders, is that E.Z. would take her child to Cagle’s, given Cagle’s reputation.  
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1 E.Z. explained what she was thinking at the time. E.Z. did not appear shaken or  
2 upset. E.Z. told Detective Williams that Cagle and Starnes used to give her water and  
3 food. Detective Williams suggests that they also gave her drugs, and E.Z. confirmed  
4 that Cagle did through her ex-boyfriend. Detective Williams told E.Z. that getting  
5 drugs from Cagle and her ex-boyfriend was not helping her, but keeping her under the  
6 control of narcotics. E.Z. confirmed that she smoked meth prior to arriving at Cagle's.  
7 Detective Williams advised E.Z. that the people she hangs out with are a bad  
8 influence.  
9

11 The conversation briefly turned to a discussion about E.Z.'s youngest child, and  
12 then to the murder again. E.Z. stated that she doesn't think that she was still under the  
13 effect of methamphetamine when she arrived at Cagle's. Detective Williams asked  
14 E.Z. what she thinks is causing her to make her decisions. The conversation then  
15 turned back to E.Z.'s familiarity with the individuals she saw at Cagle's.  
16

18 E.Z. asked Detective Williams if he thought that "they" (referring to the  
19 murderers) will come looking for her to stop her from testifying. Detective Williams  
20 and E.Z. talked about that concern for some time. E.Z. expressed that she thought that  
21 they were trying to stop the truck from going and were going to kill her and the other  
22 occupants, including her baby. She stated that she didn't think of her son when she  
23 went to Cagle's. E.Z. says she "curses" herself because her son was there, because  
24 "they" didn't care who they killed. E.Z. said that she should have known better and  
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1 that she just didn't think of her son at the time. E.Z. said she felt bad for putting her  
2 baby in that spot. E.Z. said that she was in the wrong place at the wrong time and just  
3 didn't think of her son. At that point, her own words and reflection, *not* the words of  
4 Detective Williams, caused E.Z. to begin crying.  
5

6 Detective Williams said that being a parent means you have to think about  
7 things really hard. Detective Williams started talking about raising teenagers and  
8 infants at the same time and told E.Z. about the importance of being a good role  
9 model. E.Z. stopped crying during this portion of the conversation.  
10

11 She was no longer crying (and certainly not "cowering" in the corner) when  
12 Detective McIlrath entered the interview room with the photo lineups at 13:40,  
13 approximately 15 minutes after he left.  
14

15 Conversation turned back towards E.Z.'s observations. E.Z. stated she only  
16 recalled seeing the man in the red shirt and the man in the blue shirt the first time the  
17 group arrived at Cagle's (prior to picking up Hernandez). The man in the blue shirt,  
18 she recalled, had been walking out of Cagle's house as the group was leaving. E.Z.  
19 and the Detectives talked a little more about Cagle and the property. This portion of  
20 the conversation lasted approximately three minutes. E.Z. was not crying during this  
21 portion and is composed well before the lineup is initiated.  
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25 Detective McIlrath asked Detective Williams if there were any lineup  
26 instructions on the desk. There were none, so he left to go get some. While he was  
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1 gone for approximately one minute, no relevant substantive conversation passes  
2 between Detective Williams and E.Z.

3 Detective McIlrath returned with lineup instructions and handed them to  
4 Detective Williams. Detective McIlrath gave a cursory glance at the batch of lineup  
5 photos in his hand (the lineup for James Cloud) to confirm that he had the right lineup  
6 and that the cover page was not inadvertently left in. Detective Williams then told  
7 E.Z. that the important thing was that the person may or may not be in the lineup, and  
8 that E.Z. should not feel obligated to pick anyone. He then read the instructions off the  
9 sheet verbatim:  
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12  
13 “You are about to be shown a group of photographs. Before you view these  
14 photographs, please read the following carefully: Because an officer is  
15 showing you a group of photographs, this should not influence your  
16 judgment in any way. The person who committed the crime may or may not  
17 be in this group of photographs. It is just as important to eliminate innocent  
18 persons as it is to identify those persons responsible. You are in no way  
19 obligated to identify anyone. Study each photograph carefully before making  
any comments. Consider that the photographs could be old or new, and that  
they hair styles change and that persons can alter their appearance by  
growing or shaving facial hair.”

20 E.Z. confirmed she understood the instructions. Detective Williams gave the  
21 written instructions to E.Z. and asked her to sign. Detective McIlrath handed the  
22 lineup to Detective Williams. Detective Williams asked Detective McIlrath if they  
23 should complete one instruction sheet for all lineups or four separate instruction  
24 sheets. They pondered this for less than ten seconds before Detective McIlrath left the  
25 interview room to get more instructions sheets. This 10 second exchange is what the  
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1 Defendant characterizes as “confusion.” Detective Williams also briefly flipped  
2 through the lineup to make sure it was the correct lineup and had no incorrect filler  
3 pictures or the cover sheet containing the names of those pictured. He then handed the  
4  
5 six photographs to E.Z.

6 E.Z. flipped to the second sheet rather quickly after apparently not recognizing  
7 the first individual pictured. The second picture was of Defendant James Cloud. E.Z.  
8 almost immediately stated: **“This guy I think I recognized him. I don’t know if he**  
9 **was the one wearing the redshirt<sup>2</sup>,”** thus indicating that she recognized the  
10 Defendant as one present at the crime scene, but wasn’t yet sure if he was the one in  
11 the red shirt. Note, this is not a statement that James Cloud was not the man who shot  
12 Overacker, as Defendant claims. E.Z. then continued flipping through the  
13  
14 photographs.

15  
16 Meanwhile, having heard E.Z.’s declaration that she recognized the Defendant,  
17 Detective Williams provided E.Z. a pen, because she would need to write down on the  
18 picture that she recognized the Defendant. E.Z. took no notice of the pen.  
19  
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21 E.Z. flipped back to the Defendant’s photograph and stated: **“This is the guy**  
22 **who was wearing the red shirt, the one who shot Dennis.”** Detective McIlrath  
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26 <sup>2</sup> There is disagreement between the United States and the Defendant as to what was  
27 actually said here.

1 handed the pen to the E.Z. and said “okay do you want to write that on there and sign  
2 your name? Just write ‘guy who shot Dennis’ or whatever, if that’s what you think.”

3 This is point that the Defendant claims the Detectives make eye contact,  
4 although in the Defendant’s photo there is no way of telling that, and indeed,  
5 Detective Williams appears to be looking at E.Z., not Detective McIlrath. E.Z., while  
6 the Detectives were supposedly making eye contact while not facing each other,  
7 remained looking at the picture of the Defendant. One wonders how this supposed eye  
8 contact could have any impact on E.Z. when she didn’t even see it.  
9

10  
11 E.Z. wrote “guy who shot Dennis” (exactly what she had just said out loud,  
12 unprompted) on the Defendant’s photo and signed it.  
13

14 Detective Williams next handed E.Z. the photo lineup including a picture of  
15 another suspect, M.J. E.Z. flipped through and stated “I think this is the guy in the  
16 blue shirt” referring to the picture of M.J. E.Z. stated that the individual “looked white  
17 far away and then got close, and you could tell he was native, I think.” She also stated  
18 that he was the individual who had come up to the car and told the group that Cagle  
19 was not having any visitors.  
20

21  
22 The next lineup shown to E.Z. included N.J. E.Z. identified a photo that she  
23 thought was a photo of an individual who was present, but E.Z. did not want to make  
24 a selection because she was only about 30% sure. Donovan’s lineup had similar  
25 results.  
26

1 At the conclusion of the lineups, E.Z. again confirmed that the guy in the red  
2 shirt, now identified as the Defendant, shot Overacker. E.Z. described the guns  
3 possessed by the Defendant and the man in the blue shirt whom she had picked out of  
4 the lineups. E.Z. stated that Hernandez and the Defendant spoke for a good four or  
5 five minutes, and that they were “kind of laughing” by the red SUV (thus indicating  
6 that she was watching and could see them both through the rear window of  
7 Overacker’s truck). She then stated that the Defendant was walking next to Hernandez  
8 as they approached Overacker’s truck. When they got to the truck, Overacker rolled  
9 his window down, Hernandez asked for a cigarette, and the Defendant shot Overacker.  
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12 E.Z. also stated that while Hernandez and the Defendant were talking, the man  
13 in the blue shirt entered Cagle’s trailer and then exited again. E.Z. stated that  
14 Hernandez walked toward the trailer, but didn’t enter it. These statements also indicate  
15 that E.Z. was observing what was going on during this four or five minute period  
16 through the rear window of the truck. She provided a little more detail about the  
17 physical appearance of the Defendant, adding that he had dirt on the back of his shirt.  
18 E.Z. also added that Cagle’s dogs were going underneath the trailer while all this was  
19 going on (yet another observation through the rear window of the truck).  
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23 E.Z. provided a few more details, adding that a white van was next to the red  
24 SUV at Cagle’s. She stated that the van was a utility type van without a window, and  
25 was clean. She stated that when they had come back the second time, the four  
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1 individuals were getting ready to leave in the red SUV. She stated that the Defendant  
2 was in the passenger seat of the red SUV when they arrived the second time, and had  
3 gotten out to talk to Hernandez. She again said that she saw the Defendant shoot  
4 Overacker. The Detectives left the interview room.  
5

6 Detective Williams entered the interview room and stated that he wanted E.Z.  
7 to call her CPS worker and let her know that Detective Williams would like to talk to  
8 her. He advised that CPS would like to see E.Z. get into treatment on her own accord.  
9 He advised that doing so would show that she wants to recover. He said that he  
10 understood that “it is not easy” to fight addiction. He stated that E.Z. is going to have  
11 some trauma from the murders she witnessed and that she is going to need help with  
12 that too. They discussed this for a few minutes and Detective Williams again  
13 encouraged her to seek treatment, and he also stated that no one believed that she  
14 would willingly put her child in danger. This conversation took approximately five  
15 minutes.  
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19 The interview concluded with E.Z. signing a Sworn Statement form provided  
20 and read to E.Z. by Detective Williams. While she was signing, Detective Williams  
21 offered more words of encouragement to E.Z. Detective Williams and E.Z. talked a  
22 little more about her pending CPS case, with E.Z. talking freely about the matter,  
23 before leaving the interview room.  
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### III. ANALYSIS

In order to successfully move this Court to conduct a review of the reliability of an eyewitness identification before allowing a jury to decide reliability for themselves, the Defendant must first show the existence of police misconduct that was (1) unnecessary and (2) unduly suggestive. Without that showing, the inquiry ends before any trial court review of reliability, and the jury is allowed to hear both the eyewitness identification and any admissible evidence Defendant wishes to present to attack reliability. Even if the Court finds such conduct however, it must next determine whether E.Z.'s identification is nonetheless reliable before deciding whether to strike it.

**A. Police administering the lineup did not engage in misconduct that was unduly suggestive and therefore this Court should not engage in its own review of E.Z.'s reliability as a witness.**

A defendant does not have a constitutional right to a perfect lineup. *See Manson v. Brathwaite*, 432 U.S. 98, 104 (1976). Instead, a suspect has a due process right to be free from a lineup that "[i]s so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. U.S.*, 390 U.S. 377, 384 (1968). Furthermore, the suggestiveness must be the product of police misconduct. *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012). Because there is no evidence that any law enforcement official acted improperly in a way that suggested which picture E.Z. should pick out of the lineup in question, E.Z.'s identification



1 cannot be hidden from the jury, and whether or not her identification is reliable is a  
2 solely question for them to decide.

3       The Constitution protects a defendant against a conviction based on evidence of  
4 questionable reliability, not by prohibiting introduction of the evidence, but by  
5 affording the defendant means to persuade the jury that the evidence is unreliable  
6 *Perry*, 565 U.S. at 237. Potential unreliability of evidence does not render its  
7 introduction at trial fundamentally unfair. *See Kansas v. Ventris*, 556 U.S. 586, 594  
8 (2009) (rejecting a broad exclusionary test for uncorroborated jailhouse snitch  
9 statements). Even assuming that eyewitness testimony is fallible, fallibility does not,  
10 without the taint of police misconduct, justify a trial court screening the evidence for  
11 reliability before allowing a jury to make that determination. *Perry*, 565 U.S. at 245.  
12 Before E.Z.'s identification of the Defendant can be concealed from the jury, the  
13 Defendant must show that police acted improperly in obtaining the identification by  
14 creating circumstances that were both unnecessary and suggestive. *Id.* at 228 (citing  
15 *Manson*, 432 U.S. at 98).  
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21       This prerequisite – an affirmative showing of police misconduct – makes sense,  
22 and protects a cornerstone of our judicial system: the fundamental role of the jury to  
23 weigh evidence. Without this prerequisite, the door would open to judicial review of  
24 every eyewitness identification prior to its introduction to the jury. *Perry*, 565 U.S. at  
25 243. That type of review would impermissibly trespass on the province of the jury to  
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1 weigh the reliability of evidence. It would also render null the protections already  
2 afforded defendants in cautioning juries against placing undue weight on eyewitness  
3 testimony the defendant believes unreliable. These protections include the Sixth  
4 Amendment right to confront the eyewitness, *see Maryland v. Craig*, 497 U.S. 836,  
5 845 (1990) (“The central concern of the Confrontation Clause is to ensure the  
6 reliability of the evidence against a criminal defendant.”); the right to an attorney who  
7 can expertly test the eyewitness’ testimony through cross examination, and argue  
8 unreliability to the jury, *Perry*, 565 U.S. at 246; and the protections already built into  
9 the courts’ instructions to the jury to consider whether the identification was the  
10 product of the eyewitness’s own recollection or was the result of subsequent influence  
11 or suggestiveness. MODEL CRIM. JURY INSTR. 9th Cir. 4.11 (2020). A critical aim of  
12 the prerequisite of police misconduct is not to rob the jury of their right to weigh  
13 evidence, but instead to deter law enforcement from using improper line-ups, show-  
14 ups and photo arrays. *Perry*, 565 U.S. at 241 (citing *Manson*). Because here, the  
15 Defendant has alleged no police misconduct, but instead, violations of best practices  
16 that did not influence E.Z.’s identification, the Court’s inquiry is complete under  
17 *Manson* and *Perry*. Even if the Court were to find misconduct here based on the  
18 Detective’s failure to administer the lineups in a blinded manner, the Court must also  
19 find that such conduct “created a ‘substantial likelihood of misidentification.’” *Id.* at  
20 239 (citing *Neil v. Biggers*, 409 U.S. 188, 201 (1972)).  
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1 With respect to lineups in particular, courts have been reluctant to suppress in-  
2 court identification unless “the photographic identification procedure was so  
3 impermissibly suggestive as to give rise to a very substantial likelihood of irreparable  
4 misidentification.” *Simmons v. United States*, 390 U.S. 377, 384 (1968). That is  
5 because, despite the hazards of initial identification by photograph, the procedure has  
6 been useful in apprehending offenders and sparing innocent suspects, and any danger  
7 of misidentification is “substantially lessened” by cross examination. *Id.*  
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10 In this case, the Defendant alleged several incidents of misconduct that the  
11 Defendant submits are so unduly suggestive as to justify this Court in assessing the  
12 reliability of E.Z.’s identification prior to submitting it to a jury. For the reasons that  
13 follow, none of the alleged incidents of misconduct, alone or together, justify such a  
14 drastic step.  
15  
16

17 The alleged incidents of misconduct here can be broken down into two  
18 categories: acts that may create circumstances where suggestion is more likely and  
19 acts that are actually suggestive. With respect to the first type, the Defendant alleges  
20 three acts that are not suggestive in and of themselves, but create an environment  
21 where suggestion becomes more likely: (i) a lecture by Detective Williams, (ii) the  
22 failure to use a blinded procedure and (iii) the failure to use a sequential line up  
23 technique. With respect to actual suggestion, the Defendant alleges three acts: (i) the  
24 bookmarking of a photograph with a pen, (ii) the instruction of Detective McIlrath to  
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1 E.Z. to write down what she had just stated about the picture of the Defendant, and  
2 (iii) the use of a “suggestive” photo array.

3 The first act alleged by the Defendant that created a suggestive environment is  
4 non-existent. There was no lecturing by Detective Williams, and an objective review  
5 of the recording evidences no such thing. The other two acts are policy violations,  
6 admittedly, but in and of themselves are not suggestive. Although a blinded lineup is  
7 ideal, a non-blinded lineup is not per se suggestive, absent an actually suggestive act.  
8 It is merely prophylactic.  
9

10  
11 As to the three suggestive acts alleged by the Defendant, they are not suggestive  
12 at all and it is apparent from the video that they had no influence on E.Z.  
13

14 Taking each of the allegations made by the Defendant in turn:

- 15 i. Detective Williams did not lecture E.Z., despite how Defendant’s cherry-picked  
16 excerpts from the conversation might make it appear, and nothing about the  
17 conversation was suggestive.

18 While Detective McIlrath was out of the interview room generating the  
19 Spillman lineups, Detective Williams and E.Z. continued to talk about various topics  
20 for 15 minutes. From this 15 minute conversation, the Defendant cherry picked three  
21 sentences and on that basis alone, classified the entire conversation as a moral lecture.  
22 That characterization is inaccurate. The United States is submitting the video of the  
23 interview as a physical exhibit to this motion and implores the Court to view the  
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1 portion of the interview that the Defendant characterizes as a lecture<sup>3</sup>. An objective  
2 review of the conversation dispels the Defendant's version. The conversation that took  
3 place was a discussion about E.Z.'s children and ongoing drug habit. E.Z. was an  
4 active participant in the conversation, not the cowering child that Defendant attempts  
5 to paint. It's clear from the conversation that Detective Williams was sincerely  
6 concerned for E.Z. and the wellbeing of her child. This was far from misconduct. This  
7 was far from behavior that we should seek to deter. This was police officer doing his  
8 job.  
9  
10

11 Defendant's motion gives the impression that E.Z. was crying in a corner when  
12 Detective Williams reentered the room. Def. Mtn. at 13. That is also inaccurate. E.Z.  
13 had been crying earlier, but was recomposed by the time Detective McIlrath reentered.  
14 And E.Z.'s crying was not brought on by Detective Williams's questioning, but by  
15 E.Z.'s own recalling of the events in which her and her son could have been killed.  
16  
17

18 Furthermore, the Defendant's explanation for how this 15 minute conversation  
19 is created a suggestive environment is unconvincing. The Defendant's expert's  
20 opinion that the conversation between Detective Williams and E.Z. made E.Z. more  
21 susceptible to suggestion relies on the premise that Detective Williams spent 15  
22 minutes lecturing E.Z. The expert's characterization is as off-the-mark as the  
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24  
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---

26 <sup>3</sup> This 15 minute conversation begins at 13:26 as indicated by the time stamp on the  
27 video.

1 Defendant's, as any objective review of the video demonstrates. Further, the  
2 Defendant's purported expert does not opine that making witnesses feel bad about  
3 themselves actually influences them, but rather, makes a witness more susceptible to  
4 influence. As detailed below, no such influence existed here.  
5

- 6 ii. Each Detective checked the photo lineup to make sure the lineup was correctly  
7 compiled, and that act is not unduly suggestive.

8 Each Detective gave a cursory flip-through of the photo lineup including James  
9 Cloud's photo prior to administering the lineup. Each detective is expected to testify  
10 that their reason for doing so was to make sure they had the right lineup and that it  
11 only included the relevant photos. Detective McIlrath had just compiled four lineups  
12 from Spillman and printed them all out prior to bringing them into the interview room.  
13 Each photo lineup included not only the photos, but also a sheet that included the  
14 names of each individual pictured. The Detectives' cursory review of the lineup was  
15 for the purpose of ensuring that the lineup was correctly compiled (i.e., including the  
16 correct photos) and that the sheet listing the names of those pictured was not included.  
17  
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19

20 The flipping through of the photos made this lineup no longer "blind." That is a  
21 violation of best practices and department policy, true. But that does not equate to  
22 misconduct. Nor was it suggestive. There is no evidence that the Detectives gave any  
23 indication as to which photo was the "right" one, and indeed, just prior to  
24 administering the lineup, told E.Z. that the suspect might not even be included in the  
25 lineup.  
26  
27

1     iii.   Showing the lineup to E.Z. all at once, rather than sequentially, was not unduly  
2           suggestive.

3           Similarly, providing all of the photos in the lineup to E.Z. at the same time was  
4 inconsistent with best practices and YSCO policy. But the failure to administer a blind  
5 lineup is not unduly suggestive. Rather, the administration of a blind lineup is  
6 included as a best practice because it is a safeguard against suggestion – if the officer  
7 doesn't know which photo is being looked at by the witness, they cannot make any  
8 conscious or unconscious suggestions. Report re Identification made by E.Z., Cara  
9 Laney, 7. Lack of a double blind or single blind procedure does not establish  
10 misconduct leading to suggestion without an actual, substantive suggestion by police.  
11 The Defendant here has alleged two such suggestions – the pointing of a pen and the  
12 suggestion of what to write on the Defendant's photo after E.Z. identified him as  
13 Overacker's murderer. As detailed below, neither act was suggestive.

14     iv.   Detective Williams did not "bookmark" any photograph when he provided a  
15           pen for E.Z. to use.

16           The alleged bookmarking by Detective Williams did not occur until after E.Z.  
17 looked at the picture of James Cloud and stated: **"This guy, I think I recognized him.**  
18 **I don't know if he was the one wearing the redshirt."** At that point, Detective Williams  
19 did not bookmark the picture; he merely laid down a pen for E.Z. to use to indicate the  
20 identification she had just made. It's worth noting here that he would have done so  
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1 even if the lineup were administered in a double or single blind fashion. It also worth  
2 noting that E.Z. doesn't look up from the photographs towards the pen at any time.

3 Again, an actual review of the video evidences not a "bookmark," but merely  
4 the provision of a pen *after* E.Z. identified the Defendant; a pen which E.Z. took no  
5 notice of.  
6

7 v. Detective McIlrath told E.Z. to write "the guy who shot Dennis" under the  
8 Defendant's photograph because E.Z. had just pointed at the photograph and  
9 said "that's the guy who shot Dennis."

10 Detective McIlrath told E.Z. to write "the guy who shot Dennis" because E.Z.  
11 had just looked at the photo and stated **"that's the guy who shot Dennis."** There is  
12 nothing suggestive about asking someone to write down, verbatim, a claim they just  
13 made, especially when qualified with "if that's what you think."  
14

15 vi. The photographs in the lineup where generated by an automated system that  
16 searched for and included filler photos with characteristics and appearances  
17 similar to the Defendant, and did not produce an unduly suggestive array.

18 When Detective McIlrath stepped out of the interview room for 15 minutes, he  
19 was compiling the four lineups showed to E.Z. He did so using a Spillman lineup  
20 generator. The Defendant's picture was already in the system from a prior arrest. The  
21 Spillman system then generated filler pictures by searching for pictures of individuals  
22 with similar characteristics as the Defendant. That is why each of the pictures is of an  
23 individual of native appearance, with short dark hair, a goatee, and a round face. All  
24 of these match E.Z.'s description of the man in the red shirt as Native American, with  
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short hair, and maybe chubby or a little thicker. If we try hard enough, we can make any one of these individuals stand out, whether it's because they have a pony tail, bruising around the neck, are the only one wearing red, appear much older, or have a reddish complexion:



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2. guy who shot  
Dennis  
chill in



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4.  
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5.  
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1 The mere use of filler pictures that include some individual characteristics not  
2 present in the Defendant's photo does not create a suggestive lineup, and none of the  
3 case cited by the Defendant is comparable. Indeed, those cases are examples of how  
4 suggestive an array should be prior to the court finding misconduct, and none of them  
5 come close to describing the lineup shown to E.Z. *See United States v. Saunders*, 501  
6 F.3d 384, 390 (4th Cir. 2007) (dark background and lack of lighting compared to filler  
7 photos gave the defendant "a menacing countenance that was lacking in the men in the  
8 other five photos"); *United States v. Eltayib*, 88 F.3d 157, 166 (2d Cir. 1996) (filler  
9 photos were cropped so that they all looked like they had short hair, while the  
10 defendant's photo included his full afro, which the witness had included in his pre-  
11 lineup description); *United States v. Wiseman*, 172 F.3d 1196, 1208-1209 (10th Cir.  
12 1999) (defendant's photo "st[ood] out prominently" and was the only one *without* a  
13 chain around the neck).

14 Similar suggestiveness is not present in the array used in this case and is more  
15 consistent with arrays previously held to be un-suggestive by the Ninth Circuit. *See*,  
16 *e.g.*, *United States v. Beck*, 418 F.3d 1008, 1012 (9th Cir. 2005) (approving a  
17 photospread where only one individual had facial hair, two individuals had shorter  
18 hair than the others, and all individuals were of similar age with similar skin, hair, and  
19 eye color); *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991) (finding a  
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1 photospread not unduly suggestive despite differences in individuals' complexion,  
 2 nationality, and hair style).

3 **B. E.Z.'s identification is reliable.**

4  
 5 Even if this Court were to find that the Detectives' failure to administer the  
 6 lineup in a blind fashion, combined with an actually suggestive act, created a lineup so  
 7 severely suggestive as to "give rise to a very substantial likelihood of irreparable  
 8 misidentification," the Court cannot suppress E.Z.'s identification unless, under the  
 9 totality of the circumstances, it determines that the E.Z.'s identification was actually  
 10 unreliable. Here however, an analysis of E.Z.'s identification shows that E.Z.'s  
 11 identification was reliable.  
 12  
 13

14 Courts look to the following factors in determining the reliability of a witness's  
 15 identification:

- 16  
 17 (1) the opportunity of the witness to view the criminal at the time of the crime;  
 18 (2) the witness's degree of attention;  
 19 (3) the accuracy of the witness's prior description of the criminal;  
 20 (4) the level of certainty demonstrated by the witness at the confrontation; and  
 21 (5) the length of time between the crime and the confrontation.

22 *Biggers*, 409 U.S. at 199-200.

23 In E.Z.'s case, each factor cuts in favor of reliability.

- 24 i. E.Z. had ample opportunity to view the Defendant at the time of the crime and  
 25 her degree of attention was high.

26 E.Z. viewed the Defendant, wearing his red shirt, twice on the day of the  
 27 murders. When E.Z., L.L. and Overacker first arrived at Cagle's, the Defendant  
 28

1 approached the vehicle and spoke to Overacker, just feet from E.Z. E.Z. was close  
2 enough to hear the Defendant tell Overacker that Cagle wasn't seeing anyone that day.  
3 Then, the second time the group arrived at Cagle's, E.Z. observed Hernandez talking  
4 to the Defendant for four or five minutes. Her view of the Defendant was not  
5 obstructed, given that she was also able to observe the man in blue entering and  
6 exiting Cagle's residence, the other individuals in the red SUV, the white van that she  
7 described as a clean looking work van, the laughing that the Defendant and Hernandez  
8 were engaged in, the dogs running underneath Cagle's residence, and the dirt on the  
9 back of the Defendant's shirt. All those observations occurred just before the  
10 Defendant approached the vehicle, at which point he would have been just feet from  
11 E.Z. before he shot Overacker. Given the amount of detail that E.Z. was able to recall  
12 about what was going on in the moments leading up to Overacker's murder, it is clear  
13 that she was not distracted by the Defendant's gun, as Defendant posits. Just prior to  
14 the shooting, E.Z. wasn't sure what the others were doing and she replied "**I don't**  
15 **even know, I think I was just watching the guy in the red.**" It's clear that her focus  
16 was on the Defendant and she had ample time to view him.  
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- 1 ii. E.Z. gave an accurate description of the Defendant prior to picking him out of  
2 the lineup.

3 In various statements, E.Z. described the Defendant as a Native American who  
4 might look white from a distance, around 19 to 23 years old, with a chubby or thicker  
5 appearance and puffy or curly dark hair. Or, put visually:



15 As Defendant points out, at one point, E.Z. also described the man in blue as the  
16 one who looked white from a distance and who had initially told the group that Cagle  
17 wasn't seeing anyone. But E.Z. only identified one individual as the one who shot  
18 Overacker: the Defendant.  
19

- 20  
21 iii. E.Z. almost immediately and confidently recognized the Defendant when she  
22 saw his picture.

23 Despite the compilation of a lineup that included individuals with similar  
24 characteristics, E.Z., upon seeing the Defendant, immediately declared **“This guy, I**  
25 **think I recognized him.”** Then, after flipping through the remaining photos and not  
26 picking out anyone else, she quickly returned to the Defendant's photo and identified  
27

1 him as “**the guy who shot Dennis.**” As evidenced by her reluctance to make an  
2 identification in later lineup when she was only about 30% sure, E.Z. would not have  
3 hesitated to disclaim an identification if she was not confident. Here, it’s clear she was  
4 certain.  
5

6 iv. E.Z. picked the Defendant out of a lineup up only two days after she saw him  
7 shoot Overacker.

8 Two days is not such a long period of time as to make an identification  
9 unreliable. *United States v. Hammond*, 666 F.2d 435, 440 (9th Cir. 1982) (a lapse of a  
10 week not long enough to indicate clear unreliability). As evidenced by E.Z.’s  
11 description of the scene (e.g. the van, the SUV, the dogs, the guns, etc.), the events of  
12 June 8<sup>th</sup> were still fresh in her mind.  
13

14 Even if this Court were to find that Detectives Williams and McIlrath, by  
15 failing to conduct a blinded lineup, engaged in misconduct that created unduly  
16 suggestive circumstances, this Court cannot find, under a *Biggers* analysis, that E.Z.’s  
17 identification is unreliable.  
18  
19

#### 20 IV. Conclusion

21 The Defendant does not have a right to a double blind lineup. He does not have  
22 the right to a perfect lineup. He has the right to a lineup free from misconduct in  
23 which police use an unduly suggestive procedure. He received that here. Defendant  
24 has pointed out some procedural aspects that could have been improved. That is well  
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1 short of the standard he needs to meet prior to this Court engaging in a reliability  
2 review of E.Z.'s identification.

3 But even if the Court were to engage in such a review, it would find E.Z.'s  
4 identification of the Defendant reliable. She had ample time and opportunity to view  
5 the Defendant, her identification was confident and consistent with prior descriptions,  
6 and was given only two days after the events in Medicine Valley. The jury should be  
7 allowed to hear her full story. The Defendant's motion should be denied.  
8  
9

10  
11 DATED: September 11th, 2020

William D. Hyslop  
United States Attorney

13 s/ Thomas J. Hanlon

14 Thomas J. Hanlon  
Assistant United States Attorney

16 s/ Richard Burson

17 Richard Burson  
Assistant United States Attorney

18  
19 I hereby certify that on September 11th, 2020, I electronically filed the foregoing  
20 with the Clerk of the Court using the CM/ECF System which will send notification of  
21 such filing to the following: Lorinda Youngcourt, Esq.; John B. McEntire, IV, Esq.;  
22 Jeremy B. Sporn, Esq.

23 s/ Richard Burson

24 Richard Burson  
Assistant United States Attorney